

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

413

NO. 21,839

LESLIE A. SPRIGGS

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

FILED AUG 10 1968

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Criminal Jury Instructions For the District of Columbia  
Published by the Junior Bar Section of the District of  
Columbia Bar Association. F73-79

p. 6, 8

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Was the second count of the indictment under 21 U.S.C. 174 defective in omitting an element of the offense?
  - II. Did the trial court err in reading to the jury the entire statutory language of 21 U.S.C. 174 under Count II of the indictment where the defendant was only indicted under a portion thereof?
  - III. Were the instructions dealing with Count II of the indictment prejudicially deficient and confusing?
  - IV. Were the instructions concerning Count I inadequate and misleading?
- 

This case has not previously been before this Court.

STATEMENT OF THE CASE

Appellant Leslie Spriggs was arrested on August 17, 1967, and charged in a two count indictment for Violations of the Federal Narcotics Laws, 26 U.S.C. 4704(a) and 21 U.S.C. 174, respectively. Defendant plead not guilty on October 20, 1967. He was tried on January 25, 1968, and found guilty as charged on both counts on January 29, 1968. Appellant was sentenced one to three years on Count I and five years on Count II; the sentences to run concurrently. Appellant then filed a timely application for leave to appeal which was granted.

At the trial, Detectives Bovia and McGlynn testified that they arrested Mr. Spriggs for exposing himself on the street (TR 6). Upon searching appellant, they found several envelopes containing what appeared to be narcotics (TR 29-30). Dr. Steele, a chemist for the IRC. testified that chemical tests showed the envelopes to contain heroin (TR 49).

Appellant testified in his own behalf saying that he obtained the packets in question from a place where he had seen them hidden in a empty house (TR 63). He further stated that he knew little about drugs and particularly did not know whether they were illegally imported. (TR 64).

There followed a discussion between the Court and counsel concerning proposed instructions (TR 81) and defense counsel

made timely objections (TR 85). The jury was then instructed in such manner as to give rise to the substance of this appeal and retired (TR 85A-104).

Later, the Court received a note from the jury expressing confusion over Count I in response to which the Court read and somewhat elaborated upon the statute (TR 105-109).

The jury then returned with their verdict of guilty on both counts.

#### ARGUMENT

##### I. Defective Indictment as to Count II under 21 U.S.C. 174.

Appellant avers that the second count of the indictment which was purportedly drawn pursuant to the language of 21 U.S.C. 174 was fatally defective as its language omitted an element of the offense. Reliance for this proposition is placed on United States vs. Calhoun (CA-7), 257 F.2d 673, wherein the defendant's conviction under the above-cited United States Code section was reversed on the ground being advanced herein.

In that case the fifth count of the indictment, found in the marginal footnotes at P. 675 of the opinion, recited in relevant portions as follows:

"The April 1957 Grand Jury further charges:

"That commencing on or about March 22, 1957, . . . Joseph Calhoun, John Childress . . . , defendants herein, did unlawfully, wilfully and knowingly conspire to conceal, sell and to facilitate the transportation, concealment and sale of narcotic drugs, to wit, heroin hydrochloride, after importation into the United States contrary to law, knowing the same to have been imported, and in furtherance . . . ; in violation of Sec. 174, Title 21, U. S. Code, as amended by the Narcotic Control Act of 1965." (Italics supplied)

In this case the second count of the indictment recited as follows:

"On or about August 17, 1967, within the District of Columbia, Leslie A. Spriggs facilitated the concealment and sale of a narcotic drug, that is, one hundred nineteen glassine envelopes containing a mixture totaling about 14,890 milligrams of heroin hydrochloride, guinine hydrochloride and mannitol, after said heroin hydrochloride had been imported into the United States contrary to the law, with the knowledge of Leslie A. Spriggs. . ." (Italics supplied)

It is submitted that there is a sufficient similarity of deficiency between this case and the Calhoun case to bring the former within the latter's ambit. Note, for example, the difference in indictment language of this case and that found in Aggers vs. United States (CA-8), 366 F.2d 744, 749:

"In our present case, the court read the indictment which charges defendants "did wilfully, knowingly, unlawfully and feloniously conspire \* \* \* to receive, conceal, buy, sell, \* \* \* heroin \* \* \* after being imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law in violation of Title 21, United States Code, Section 174, \* \* \*."

In that case there could be no question about the indictment's sufficiency. In the instant case, the same is not true. Also see Robinson v. United States (CA-10), 263 F.2d 911, where the defective indictment reversed therein was not very dissimilar to that in this case.

## II. - Error to Read Entire Statute Under Count II.

Appellant contends that the trial court erred in reading the entire comprehensive language of 21 U.S.C. 174 to the jury. Assuming arguendo the sufficiency of the indictment under Count II, it is apparent from a reading thereof that

the defendant was not charged under the language of the whole statute but rather, ". . . Leslie A. Spriggs facilitated the concealment and sale of a narcotic drug. . . "

At the time of the charge to the jury, the Court, after reading the indictment language (TR 99), then proceeded to read the applicable United States Code section. The learned judge, did not, however, read only those portions paralleling the indictment but he also recited, "Whoever . . . receives, conceals, buys, sells or in any manner facilitates the transport, concealment, or sale of any such narcotic drug . . . " (TR 99). It is submitted that by this action the pending indictment was expanded in its scope so that the additional inapplicable portions of the statute stating additional criminal offense possibilities were virtually incorporated by reference, all to the obvious detriment and prejudice of the defendant.

### III. Instructions Under Count II of Indictment.

Appellant avers that the instructions relating to 21 U.S.C. 174 given by the trial court to the jury were deficient in numerous respects and as such affected substantial rights to the defendant's prejudice. It is observed, at the outset, that the court did not define the essential elements of the offense charged nor did it come to grips, except in a

general fashion, with the defendant's proffered defense. Compare, for example, those instructions utilized in this case under 21 U.S.C. 174 with the basic form of suggested model instructions found in Instruction No. 94 and 95, respectively, of the Criminal Jury Instructions for the District of Columbia published by the Junior Bar Section. A copy of the said Instructions is attached hereto in the Appendix for the convenience of the court.

On the question of explaining the essential elements of the offense and the likelihood of jury confusion, due to the inartful wording of the statute involved, note United States vs. Llanes (CA-2), 374 F.2d 712, 715, and Griego vs. United States (CA-10), 298 F.2d 845. Certainly those cases suggest, at the very least, that a mere reading of the statute is not enough and that the elements of the crime charged should be spelled out and tied in with the statutory presumption relating to possession.

Further there, as here, the defendant's proffered defense revolved around no knowledge of the narcotic drug's illegal importation and yet there was no attempt to enlighten the jury in that area either.

Also challenged is the trial court's addition to the instruction proffered by the defendant's trial counsel. As

counsel stated, his proposed charge was patterned after United States vs. Peoples (CA-2), 377 F.2d 205 and the parallel of his instruction to the appellate court's language can be observed by reading P. 210 of the decision. The lower court, however, refused to strictly adhere to the opinion's language and instead added the following italicized words:

"You are free to believe if you wish to so believe, evidence of the defendant's lack of knowledge of the unlawful importation regardless whether his possession was lawful. But you may, if you so desire, disbelieve evidence that the defendant did not know that the narcotics in question had been unlawfully imported."

The addition of this language did not conform to the Peoples guidelines and certainly served to dilute the defendant's potential defense.

Appellant submits that the totality of the errors in the instructions combined to constitute reversible error.

#### IV. Instructions Under Count I.

With respect to Count I drawn pursuant to 26 U.S.C. Sec. 4704(a), it is observed that the instructions proposed suffered from the same infirmity as Count II in that they did not enumerate the elements of the offense, nor explain

in detail the statutory presumption relating to possession. Compare the instructions given in this case to Instruction No. 92 and 93 of the Criminal Jury Instructions for the District of Columbia published by the Junior Bar Section. A copy of said Instructions is attached hereto in the Appendix for the convenience of the Court.

To compound this deficiency, the court in the initial part of its instructions proceeded to include matters entirely unrelated to the offenses charged. The role of narcotics in medicine, their unsupervised use and the unprescribed sale and purchase thereof were touched on. Then the court stated (TR 27), ". . . All traffic in narcotics outside of the channels prescribed by law as I have just indicated, is illicit and because of its detrimental effect on the community, it is regarded as criminal.

Now the defendant is charged in the indictment in the case with the possession of narcotic drugs and with the facilitation and concealment and sale of a narcotic drug knowing it to have been imported contrary to law."

The mention of the channels indicated by the court as being outside of the law could only be confusing inasmuch as the remarks preceding that statement were only generally directed to narcotics. Although they did not pertain to this particular defendant and his charges specifically, they

certainly gave a broad sweep as to narcotics violations which were beyond the scope and in excess of the charges of the indictments and could only have served to confuse the jury.

Then, contrary to decided case law--see United States v. Landry, 257, F.2d 425, 431,--the court indicated that the defendant was charged with the possession of narcotics as a crime. Clearly possession of narcotics is not a crime, but is merely a rule of evidence.

It is therefore not difficult to perceive why the jury eventually returned with a note stating they were confused. From that point in time, the problem causing the confusion seemed to become greater, rather than diminish.

For example, in an effort to respond to the jury's note, wherein they indicated confusion on whether mere possession inferred purchasing, selling, dispensing and distributing, a bench conference was held (TR 105-107). Although at Transcript reference 107 the court stated, "The statute says: may infer, it doesn't use the word shall or must. I think I better read the whole statute again and see what happens. . . ." When the jury was reinstructed, the statutory word shall was used. Then instead of making it clear that it was a may situation and explaining, the court

g+vv

chose to let the jury worry about what it meant (TR 106,100). In fact, in view of the specific question asked, it would appear that a re-definition of prima facie (TR 100) was ill-advised. These actions coupled with the statement that, "... Now the law does not require strict proof of the sale, purchase, dispensing or distributing of a drug." (TR 100), certainly did not insure a knowledgeable jury in a position to fairly try the defendant and hence resulted in reversible error.

#### CONCLUSION

Wherefore, appellant submits that:

1. The indictment of Count II was defective in omitting an element of the offense.
2. The trial court erred in reading to the jury the entire statute concerning Count II.
3. The totality of the instructions under both counts of the indictment is so misleading, confusing and erroneous as to fatally prejudice the appellant.

Accordingly, appellant's convictions should be reversed with directions to grant a new trial as to Count I and a judgment of acquittal as to Count II.

Respectfully submitted,

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Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that I have this \_\_\_\_\_ day of August, 1968, mailed, postage prepaid, a copy of the foregoing Appellant's Brief and Appendix to United States Attorney, United States Courthouse, Washington, D. C.

---

John C. Duncan, III  
Attorney for Appellant  
Appointed by this Court

REFERENCE

1. Indictment of October 2, 1967.
2. Defendant's Proposed Instruction,  
January 29, 1968.
3. Judgment and Commitment, March 16, 1968.
4. Transcript, P. 11-109.
5. P. 73-79 of Criminal Jury Instructions for  
the District of Columbia published  
by the Junior Bar Section of the District  
of Columbia Bar.

91                   NARCOTICS—SALE—  
DEFENDANT AS PURCHASING AGENT

If the defendant was requested by a law enforcement official or his agent to obtain narcotics, thereupon undertook to act in the prospective purchaser's behalf rather than his own, purchased the drugs from a third person, with whom he was not associated in selling narcotics, and delivered them to the buyer, the defendant would not be a seller of narcotics. If you have a reasonable doubt whether or not the defendant sold the narcotics, you must find him not guilty.

Lewis v. United States, 119 U.S. App. D.C. 145, 337 F.2d 541 (1964); Kelley v. United States, 107 U.S. App. D.C. 122, 275 F.2d 10 (1960).

91-A               NARCOTICS—SALE—  
IDENTITY OF DEFENDANT

You may not find the defendant guilty of the sale of narcotics, unless you find that the Government has proved beyond a reasonable doubt that the defendant is the person who committed the offense. If the circumstances of the identification are not convincing beyond a reasonable doubt, you must find the defendant not guilty.

Sanley v. United States, \_\_\_\_ U.S. App. D.C. \_\_\_\_, 353 F.2d 897 (1965).

92   NARCOTICS—PURCHASE OR SALE—  
26 U.S.C. SEC. 4704(a)

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are:

(1) That the defendant knowingly purchased, sold, dispensed or distributed a narcotic drug; and

(2) That the narcotic drug was purchased, sold, dispensed or distributed otherwise than in the original stamped package or from the original stamped package.

To establish the first element of the offense, it is necessary that the defendant have either purchased, or sold, or dispensed or distributed a narcotic drug.

[Definition of Narcotic Drug - See Instruction No. 90.]

To establish the second essential element of the offense, the narcotic drug must have been purchased, or sold, or dispensed or distributed by the defendant other than in the original stamped package or from the original stamped package.

The law imposes a tax upon all narcotic drugs, and provides that United States revenue stamps evidencing payment of the tax shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

If you have a reasonable doubt whether or not the narcotic drug was purchased, or sold, or dispensed or distributed in a package bearing the original revenue stamp, or from a package bearing the original revenue stamp, you must find the defendant not guilty.

[Defendant as Purchasing Agent—Applicable if Indictment Charges Sale—See Instruction No. 91; Lewis v. United States, 119 U.S. App. D.C. 145, 149-150, 337 F.2d 541, 545-546 (1964)]

[Identity of Defendant — See Instruction No. 91-A]

93    NARCOTICS—PURCHASE OR SALE—  
         INFERENCE FROM POSSESSION

(a) STATUTORY INFERENCE

It is provided by law that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation . . . by the person in whose possession the same may be found."

This means that if the Government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of the narcotic drug specified in the indictment and that the revenue stamps were absent from the narcotic drug while in the defendant's possession, you may, if you see fit to do so, infer from these facts alone that the defendant is guilty of this offense. You are not required to find the defendant guilty merely upon proof of these facts, but you may do so.

It is exclusively within your province to determine whether the Government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of a narcotic drug and if so, whether the Government has further proved beyond a reasonable doubt by direct evidence the absence of revenue stamps from the narcotic drug while in the defendant's possession, and, if so, whether you will from these circumstances infer that the defendant is guilty of the offense charged.

This provision of law does not change the fundamental rule that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, nor does it shift to the defendant the burden of proof on any issue in the case. The burden is upon the Government to prove every element of the offense beyond a reasonable doubt.

## (b) DEFINITION OF POSSESSION

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

Mere presence in the vicinity of a narcotic drug or mere knowledge of its physical location, does not constitute possession.

If you find beyond a reasonable doubt that the defendant, either alone or jointly with others, had actual or constructive possession of the narcotic drug described in the indictment, then you may find that such narcotic drug was in the possession of the defendant within the meaning of the word "possession" as used in these instructions.

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Harris v. United States, 359 U.S. 19 (1959); Miller v. United States, \_\_\_ U.S. App. D.C. \_\_\_, 347 F.2d 797 (1965); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962). cert. denied, 371 U.S. 930 (1962); United States v. Santore, 290 F.2d 51 (2d Cir. 1959), cert. denied, 365 U.S. 834; Cromer v. United States, 78 U.S. App. D.C. 400, 142 F.2d 697 (1944), cert. denied, 322 U.S. 760; Bates v. United States, 95 U.S. App. D.C. 57, 219 F.2d 30 (1955); Casey v. United States, 276 U.S. 413 (1928); Killian v. United States, 58 U.S. App. D.C. 255, 29 F.2d 455 (1928); Goode v. United States, 80 U.S. App. D.C. 67, 149 F.2d 377 (1945); Woolridge v. United States, 97 U.S. App. D.C. 67, 228 F.2d 38 (1955), cert. denied, 351 U.S. 989.

94      NARCOTICS—FACILITATION OF  
         CONCEALMENT OR SALE—  
         21 U.S.C. SEC. 174

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are:

(1) That the defendant in some manner facilitated the concealment or sale of a narcotic drug; and

(2) That the defendant did so fraudulently or knowingly; and

(3) That the narcotic drug had previously been imported or brought into the United States contrary to law; and

(4) That the defendant knew that the narcotic drug had previously been imported or brought into the United States contrary to law.

To establish the first element of the offense, it is necessary that the defendant have facilitated in some manner the concealment or sale of a narcotic drug.

To facilitate means to make easier or less difficult. To facilitate the concealment or sale of a narcotic drug means to do any act which makes easier or less difficult in any way the concealment or sale of a narcotic drug.

[Definition of Narcotic Drug — See Instruction No. 90.]

To establish the second essential element of the offense, it is necessary that the defendant, at the time he so facilitated the concealment or sale of the narcotic drug, have done so fraudulently or knowingly.

The intent which is a necessary part of a "fraudulent" act is the specific intent to deceive. If, however, the defendant, in facilitating the

concealment or sale of the narcotic drug, specifically intended to deceive, it is immaterial whether the Government was in fact deceived, or whether it in fact sustained any monetary loss. An act is done "knowingly" if done voluntarily and purposely, and not because of mistake or inadvertence.

To establish the third essential element of the offense, it is necessary that the narcotic drug, the concealment or sale of which the defendant facilitated, have previously been imported or brought into the United States contrary to law.

It is unlawful to import or bring any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics is authorized to prescribe by regulations; and no crude opium may be imported or brought in for the purpose of manufacturing heroin.

To establish the fourth essential element, it is necessary that the defendant, at the time he so facilitated the concealment or sale of the narcotic drug, have known that the narcotic drug had been imported or brought into the United States contrary to law.

[Defendant as Purchasing Agent — Applicable if Indictment Charges Sale — See Instruction No. 91; Lewis v. United States, 119 U.S. App. D.C. 145, 337 F.2d 541 (1964)]

[Identity of Defendant — See Instruction No. 91-A]

95      NARCOTICS—FACILITATION OF  
         CONCEALMENT OR SALE—  
         INFERENCE FROM POSSESSION

It is provided by law that "[w]henever on trial for a violation . . . the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." This means that if the Government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of a narcotic drug, you may, if you see fit to do so, infer from the fact of such possession alone that the defendant is guilty of this offense, unless the fact of such possession is explained to your satisfaction. You are not required to find the defendant guilty merely from the fact of such possession, but you may do so.

It is exclusively within your province to determine whether the Government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of a narcotic drug and, if so, whether such possession has been explained to your satisfaction, and, if not, whether you will from these circumstances infer that the defendant is guilty of the offense charged.

This provision of law does not change the fundamental rule that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, nor does it shift to the defendant the burden of proof on any issue in the case. The burden is upon the Government to prove every element of the offense beyond a reasonable doubt.

[When Defendant Does Not Testify — Possession may be explained through other circumstances and other evidence, independent of the testimony of the defendant.]

BRIEF FOR APPELLER

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,833

LESLIE A. SPRIGGS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court  
for the District of Columbia

United States Court of Appeals

2d Cir.

1968

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FILED SEP 26 1968

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Cr. No. 1229-87

## ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

1. Was Count II of the indictment, charging a violation of 21 U.S.C. § 174, defective for failing to allege knowledge of illegal importation, where the Count read substantially that the narcotic drug had been imported into the United States contrary to law, "with the knowledge of Leslie A. Spriggs?"

2. Were the instructions to the jury sufficient and correct where

a) the trial court read both the indictment, and the statutes upon which the indictment was drawn, elaborating correctly thereon, and,

b) where the trial court instructed, with respect to Count II, that lack of knowledge of illegal importation was a sufficient defense despite the fact that appellant's possession of narcotics may have been unlawful, and

c) where the trial court instructed that "possession" of narcotics was prima facie evidence of the offense charged from which the jury might infer guilt?

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This case has not been before this Court under another name or title.

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\* Cases chiefly relied upon are marked with asterisks.

# **United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 21,839**

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**LESLIE A. SPRIGGS, APPELLANT**

**v.**

**UNITED STATES OF AMERICA, APPELLEE**

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**Appeal from the United States District Court  
for the District of Columbia**

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**BRIEF FOR APPELLEE**

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## **COUNTERSTATEMENT OF THE CASE**

### **Statement of the Proceedings**

Appellant was indicted on October 2, 1967 in a two count indictment charging him with having purchased, sold, dispensed and distributed a narcotic drug that was not in and was not from the original stamped package (26 U.S.C. § 4704(a)) and with having facilitated the concealment and sale of a narcotic drug after it had been imported into the United States contrary to law and with his knowledge (21 U.S.C. § 174). Tried by a jury, appellant was found guilty on both counts and was sentenced to imprisonment for one to three years on Count I and

five years on Count II, the sentences to run concurrently. Leave to appeal without prepayment of costs was granted by the trial court on April 3, 1968.

### The Trial

The Government's evidence at trial showed as follows: On August 17, 1967 at about 8:45 p.m., Detectives Gene J. Bovio, and Thomas M. McGlynn of Precinct No. 6, saw appellant exposing himself on the corner of 13th and K Streets, N.W., while the officers were stopped for a red light (Tr. 3-4, 18, 21, 23, 28, 29, 33, 35). On seeing the officers, appellant started moving in the opposite direction (Tr. 5, 24, 35), whereupon Detective Bovio made a U-turn catching up with the appellant, stopping him and telling him he was under arrest for indecent exposure (Tr. 5, 6, 18, 24, 25, 29, 35). Detective McGlynn then ordered appellant to place his hands on a mailbox there, patting him down in a search for weapons and uncovered 118 or 119<sup>1</sup> glassine packets containing a white powder from the left rear pocket of appellant's pants (Tr. 6, 19, 26, 29, 30). These packets had no tax stamps or stamps of any kind on them (Tr. 20, 30-31). Upon taking appellant to Precinct No. 6, the detectives placed the seized packets in a property envelope (Government's Exhibit IA) and turned them over to Detective Louis T. Hankins of the narcotics squad who thereafter performed a preliminary field test on the packets, revealing the presence of a "narcotic drug of the opium group" (Tr. 19-20, 30-31, 39, 43). Detective Hankins in turn placed these packets in a Treasury Department envelope of the lock and seal type (Government's Exhibit I) and turned them over to Dr. John Allen Steele, a forensic chemist specializing in narcotic drugs for the Internal Revenue Service (Tr. 40-41, 48). Dr. Steele tested every packet and determined that they contained a heroin hydrochloride and mannitol. The Gov-

<sup>1</sup> Detective Bovio testified as to counting 118 packets (Tr. 20), while Detective Hankins and Dr. Steele later stated that there were 119 packets in all. (Tr. 39, 49.)

ernment's Exhibits I, IA and II (a polaroid picture of the packets taken by Detective McGlynn as they appeared when seized from appellant's pocket) were then entered into evidence (Tr. 58). Whereupon the Government rested its case.

Counsel for appellant then apprised the court that he wished to put the defendant on the stand (Tr. 58). A *Luck* hearing was held, after which the trial court ruled that the Government could not impeach appellant on any of his prior convictions (Tr. 58-59).

Appellant then took the stand and stated that when he was arrested he had his keys in his hands, jingling them, and denied that he had exposed himself (Tr. 62, 74-75). Appellant was later impeached on this matter over the objection of appellant's counsel (Tr. 75-77). Appellant admitted testifying in his previous trial for indecent exposure in the Court of General Sessions<sup>2</sup> that at the time of his arrest he had put his hand down into his pants because he had the "crabs", but contended that this action had occurred long before his arrest (Tr. 77). Appellant admitted having the packets in his back pocket, stating that he had stolen them from an abandoned house on 8th and K Streets, S.E. after he had seen three unknown men place what he thought was money there (Tr. 62-64, 71). He admitted that there were no stamps on the packets and that he had an idea that they were heroin (Tr. 70-71). Appellant also admitted to having used heroin previously, having used the drug as late as June, 1967, and that he was going to keep the packets for himself (Tr. 64, 66-67, 74). He also admitted having knowledge that it was illegal to buy, sell or have heroin but denied knowing that what he had in his possession was imported contrary to law, or that he knew the source of the heroin or how or from what heroin was made. (Tr. 64, 72.)

<sup>2</sup> Appellant was tried and found guilty of the charge of indecent exposure, in a trial without a jury in the Court of General Sessions, on August 18, 1967. D.C. 12115-67. This verdict has since been affirmed by the District of Columbia Court of Appeals in No. 4509 on July 25, 1968, and the mandate of that court has been issued.

### Post-Testimonial Proceedings

Counsel for appellant then requested that the court read his offered instruction to the jury (Tr. 79). The trial court agreed, but granted the Government's requested amendments thereto, over objection of counsel for appellant (Tr. 82-83). After the jury had retired to deliberate its verdict, it sent a note to the trial court for further instructions regarding the first count (Tr. 105). The court, with the agreement of appellant's counsel, re-read the law applicable to the first count (Tr. 106, 107-109). Thereafter, the jury returned a guilty verdict on both counts (Tr. 109).

### STATUTES INVOLVED

Title 21, United States Code, Section 174, provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provisions relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Title 26, United States Code, Section 4704 (a), provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absense of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

### SUMMARY OF ARGUMENT

#### I.

Count II, charging a violation of 21 U.S.C. § 174, is not fatally defective since it states all the essential elements of the offense. The phrase "with the knowledge of Leslie A. Spriggs," is no mere recital but rather a sufficient allegation of knowledge of illegal importation of the narcotic drug found in his possession when arrested.

#### II.

The trial court's instructions to the jury were both sufficient and correct, when it both read the indictment, and the statutes upon which the indictment was drawn to the jury, and elaborated correctly thereon. The trial court adequately came to grips with the affirmative defense of appellant to Count II by instructing that lack of knowledge of illegal importation was a sufficient defense to the charge despite the fact that appellant's possession of the narcotics may have been unlawful. The trial court correctly defined the role of "possession" in the offenses charged, as prima facie evidence from which a jury might infer guilt.

### ARGUMENT

- I. Count II of the indictment sufficiently alleges all the essential elements of a violation of 21 U.S.C. § 174.

Appellant argues that the second count of his indictment (dealing with a violation of 21 U.S.C. § 174) is fatally defective for failing to allege a material element of

the offense, i.e., that the defendant knew that the narcotics were imported illegally. This contention is clearly frivolous. A logical and unstrained reading of the pertinent language of the indictment reveals that this element is amply alleged.<sup>3</sup> The only logical way of interpreting the phrase "with the knowledge of Leslie A. Spriggs" is that it refers back to the preceding phrase "after said \* \* \* [drug] had been imported into the United States contrary to law". A case directly in point is *Pon Wing Quong v. United States*, 111 F.2d 751 (9th Cir. 1940), wherein the same fatal flaw was alleged in a similar indictment. The indictment there read in pertinent part, " \* \* \* and the said smoking opium had been imported into the United States of America contrary to law, as said defendants then and there knew." [Italics supplied.] 111 F.2d at 755. The Ninth Circuit rejected the argument that the phrase "as said defendants then and there knew" was a mere recital and held that it was sufficient to allege the requisite knowledge of the parties charged. Similarly, the phrase, "with the knowledge of Leslie A. Spriggs", is not merely a recital but alleges sufficiently appellant's knowledge of illegal importation.<sup>4</sup>

<sup>3</sup> Count II of the indictment reads as follows:

On or about August 17, 1967, within the District of Columbia, Leslie A. Spriggs facilitated the concealment and sale of a narcotic drug, that is, one hundred nineteen glassine envelopes containing a mixture totalling about 14,890 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported into the United States contrary to law, *with the knowledge of Leslie A. Spriggs*. This is the same heroin hydrochloride which is mentioned in the first count of this indictment. (Emphasis added).

<sup>4</sup> Reliance by appellant on *United States v. Calhoun*, 257 F.2d 673 (7th Cir. 1958) and *Robinson v. United States*, 263 F.2d 911 (10th Cir. 1959) is clearly misplaced. In *Calhoun* the pertinent language of the indictment found to be defective read as follows: "That \* \* \* [defendants] knowingly conspired to conceal, sell, and to facilitate the transportation, concealment and the sale of narcotic drugs \* \* \* after importation into the United States contrary to law, *knowing the same to have been imported \* \* \**" (Emphasis added). 257 F.2d at 675, n.1. Had the phrase "with the knowledge of the defendants," been used in lieu of the above cited italicized

II. The trial court's instructions were sufficient and correct, adequately coming to grips with appellant's affirmative defense to Count II and correctly defining the role of "possession" in the violations of 26 U.S.C. § 4704(a) and 21 U.S.C. § 174 charged in the indictment.

(Tr. 20, 30-31, 87, 88, 90-92, 93-95, 102, 105-109)

Appellant alleges that the trial court's instructions to the jury were insufficient in that they failed to fully explain the essential elements of the offenses charged, that the court failed to come to grips adequately with appellant's defense to the Section 174 charge, i.e., lack of knowledge of illegal importation, and that the statutory presumptions from possession were insufficiently tied in with the elements of the offenses. (Brief of Appellant pp. 5-6, 7-8). No objection was made by the trial counsel in this regard nor were any instructions offered to the trial court along these lines. Rule 30, Fed. R. Crim. P., states in pertinent part, "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."<sup>5</sup> Thus, these alleged errors have been waived. *Levin v. United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964), *cert. denied*, 379 U.S. 999

language, the defect in the indictment would have been obviated. Similarly in *Robinson, supra*, where the following language was found defective, "[That the defendants] did knowingly \* \* \*, and feloniously \* \* \* conspire, \* \* \* to fraudulently and knowingly receive, conceal, transport and sell narcotic drugs, to-wit heroin, after the said heroin is imported and brought into the United States contrary to law \* \* \*." 263 F.2d at 912, n.2, had the phrase "with the knowledge of the defendants", been added after "contrary to law" the *element* of knowledge of unlawful importation would have been sufficiently alleged.

<sup>5</sup> See also Rule 51, Fed. R. Crim. P., which reads in pertinent part, "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor . . ."

(1965); *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951). In any event, there was no error committed. With regard to the elements of the offenses charged, the jury was sufficiently instructed when the trial court both quoted from the statutes involved and accurately paraphrased them (Tr. 87-92, 107-109). *Williams v. United States*, 328 F.2d 256 (8th Cir.), cert. denied, 377 U.S. 969 (1964); *Harris v. United States*, 248 F.2d 196 (8th Cir.), aff'd, 359 U.S. 19 (1959); *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954); *Wheeler v. United States*, 89 U.S. App. D.C. 143, 190 F.2d 663 (1951). In *Harris v. United States*, supra, the Court of Appeals for the Eighth Circuit in affirming convictions under both of the statutes involved in the instant case, held that the jury was sufficiently and correctly instructed where the trial court read to them the provisions of the statutes and the indictment charging the violations. The Supreme Court in *Harris* refused to consider the attack upon the instruction and merely noted that there had been no objection to the court's charge at the time of the trial as required by Rule 30 of the Fed. R. Crim. P., 359 U.S. at 20-21. The court read the statute pertinent to Count I of the indictment and explained that it is unlawful to buy, sell, dispense or distribute a narcotic drug except in the original stamped package or from an original stamped package. And pursuant to the evidence elicited in this case the court went on to read and explain the statutory inference which could be drawn from possession of unstamped narcotic drugs. The trial court stated that if it was proven that appellant had possession of the drugs and that while in his possession there were no appropriate tax stamps for or on those drugs that those facts constitute evidence of a violation of the statute and the jury might find appellant guilty of the charge (Tr. 87-88, 108-109).<sup>6</sup>

<sup>6</sup> Note in this regard appellant's allegation (not objected to at trial) that the court erred by instructing the jury that appellant was charged with "possession" of a narcotic drug (Tr. 87), in that mere "possession" of a narcotic drug is not an offense under 26

The instructions as given were proper in that they were tailored to the facts of the case. *Graham v. United States*, 88 U.S. App. D.C. 129, 187 F.2d 87 (1950), *cert. denied*, 341 U.S. 920 (1951). The Government's evidence established that appellant had narcotics in his pants pocket and that the packets in which the narcotics were found did not have any tax stamps affixed to them (Tr. 20, 30-31). The Government's case rested on the statutory inference which would allow the jury to find appellant guilty of the offense based on the direct evidence of possession. There was no need to define the terms "purchased, sold, dispensed and distributed," because these words, as used in the statute, have ordinary meanings which are commonly understood. *Cf. Affronti v. United States*, 145 F.2d 3 (8th Cir. 1944). Moreover, there was no evidence put on at trial to establish that appellant had "purchased, sold, dispensed and distributed" narcotics.

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U.S.C. § 4704(a) (Brief of Appellant p. 9). While the trial court's instruction was inaccurate, the Government argues that no prejudice adhered to the defendant. The court read, as noted above, that possession was merely prima facie evidence of a violation of Section 4704(a) (Tr. 88, 108). The way in which the jury's request for further instructions was phrased, wherein they asked whether they might infer from "mere possession" a sale, purchase, dispensing or distribution, is indicative that they understood that possession was only prima facie evidence. Thereafter, the court repeated to the jury, with the approval of appellant's trial counsel, the language of Section 4704(a) making clear to them that possession was only prima facie evidence of an offense and not an offense in itself (Tr. 108). *Cf. Maynard v. United States, supra*.

Note also, the procedure followed by the trial court, instructing the jury on the law with regard to Count I, rather than merely answering the jury's query in the affirmative or negative when the jury requested further instructions (Tr. 105-109), appears to be the correct procedure. *Cf. Vauss v. United States*, 125 U.S. App. D.C. 228, 370 F.2d 250 (1966), where the court answered a similar request for instructions by a jury merely in the affirmative. The court stated there:

"No doubt, a more complete explanation would have been better advised but again no objection was made by the defense. We must read the dubious supplemental instruction along with the principal instruction and consider them as a whole; so viewed we cannot regard this as plain error." 125 U.S. App. D.C. at 230, 370 F.2d at 252.

Similar remarks may be made about the instructions with regard to Count II. There the trial court also read the charge and the entire statutory language of 21 U.S.C. § 174,<sup>7</sup> which contained all the essential element of that offense (Tr. 90-91). Here, too, the Government's evidence rested on the inference to be drawn from possession to prove illegal importation and knowledge thereof (Tr. 90-91). In this respect the trial court quite clearly came to grips with appellant's affirmative defense to this charge, lack of knowledge of illegal importation.<sup>8</sup> This instruction

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<sup>7</sup> Appellant also objects to the fact that the trial court read Section 174 in its entirety rather than those portions with which the appellant was specifically charged, the effect of which was, appellant avers, to "expand the scope" of the indictment (Appellant's Brief pp. 4-5). No objection was made in this regard at trial as required by Rule 30, Fed. R. Crim. P. The trial court, it is submitted, made a clear distinction between the charge and the statute by referring to the statute as that "under which" the charge was "drawn" (Tr. 90). While not addressing itself the particular question raised by appellant here, the Eighth Circuit, in a case charging the same offenses held that the court's reading of 26 U.S.C. § 4704(a) and 21 U.S.C. § 174 was both sufficient and correct. *Harris v. United States*, *supra*.

<sup>8</sup> The trial court instructed as follows:

Now despite the inference from possession the defendant would not be guilty of facilitating, concealment, or sale of narcotics unlawfully imported into the United States within his knowledge if he had no knowledge of its unlawful importation regardless of whether his possession thereof was unlawful. If you believe that the defendant had no knowledge of the unlawful importation, you should find him not guilty on the second count of the indictment.

It is for you and you alone to determine whether or not the defendant had knowledge of the unlawful importation of the narcotics regardless of the lawfulness of his possession.

In determining whether a defendant possessing narcotics had knowledge of its unlawful importation you may of course infer such knowledge from all the evidence before you, including the fact of possession.

You are free to believe if you wish to so believe, evidence of the defendant's lack of knowledge of the unlawful importation regardless whether his possession was lawful. *But you may, if you so desire, disbelieve evidence that the defendant did not know that the narcotics in question had been unlawfully imported.*

As you have been told the burden is on the government to prove each and every element of the offense to your satisfaction beyond

also conformed to the suggested instructions concerning the defense of no knowledge found in *Griego v. United States*, 298 F.2d 845 (10th Cir. 1962) and cited by the court in *United States v. Llanes*, 374 F.2d 712, 716 (2nd Cir.), *cert. denied*, 388 U.S. 917 (1967), both of which cases are relied upon by appellant in his brief, (Appellant's Brief p. 6), in stating that lack of knowledge is a sufficient defense regardless of the fact that the appellant may have been in possession of the drugs unlawfully (Tr. 91). If anything, the instruction on knowledge given by the trial court favors the defendant more than that suggested by *Griego*. The Tenth Circuit felt that the Government was entitled to the further instruction that " \* \* the

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a reasonable doubt. And this includes the element of knowledge of unlawful importation of a narcotic drug.

The defendant need not prove lack of knowledge for if the evidence, including the explanation of the defendant or other circumstances creates a reasonable doubt in your minds as to the defendant's knowledge of the unlawful importation, then you must acquit the defendant of the crime charged in the second count of the indictment regardless of evidence in his possession (Emphasis added) (Tr. 91-92).

*Note*, the italicized language cited above was added to appellant's requested instruction over his counsel's objection. On appeal it is contended that the addition of this language did not conform to the guidelines of *United States v. Peeples*, 377 F.2d 205, 210 (2nd Cir. 1967), from which case the instruction was allegedly drawn, and that the addition served to dilute appellant's potential defense of no knowledge (Appellant's Brief p. 7). The Government submits, however, that the instruction *did* conform to *Peeples*, and that the contested added language merely restates the sentence preceding it in the negative, i.e., that while the jury had the right to believe the defendant's evidence they also had the *right not to believe* his evidence. There is nothing erroneous about the statement, nor is it misleading. Any dilution of appellant's potential defense was surely obviated by the court's instruction immediately following the questioned language to the effect that the burden was on the government to prove knowledge beyond a reasonable doubt, that the defendant did not have to prove his lack of knowledge and that if any evidence, including his explanation, *or other circumstances*, caused a reasonable doubt in the jury's mind as to knowledge that they *must acquit*. See also, the trial court's later instruction on the presumption of innocence and repeated cautions that the government must prove *every* element beyond a reasonable doubt. (Tr. 93-95, 102).

defense [of no knowledge] is not available if the jury finds from all the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid learning the source of the heroin. Further, to be effective as a defense, the denial of knowledge must be believed by the jury." 298 F.2d at 849. In the case at bar, the trial court's charge to the jury contains no such language, but rather infers that even where the appellant's denial of knowledge is not believed "other circumstances" may be sufficient to create a reasonable doubt as to appellant's knowledge.

### CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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